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No. 82-2049

IN THE

Supreme Court of the United States

October Term, 1983

JIMMY ANDREW JOJOLA,
Appellant,

v.

STATE OF NEW MEXICO, *EX REL.*,
HUMAN SERVICES DEPARTMENT,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO

MOTION OF APPELLEE TO DISMISS

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July 12, 1983

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QUESTIONS PRESENTED

(1) Whether actions and events subsequent to the New Mexico Supreme Court decision have rendered moot the question of which forum should determine paternity and set a level of child support.

(2) Whether the question of who must reimburse the Human Services Department for expenditures on behalf of the dependent minor child or in which court suit must be brought is ripe for review prior to a determination of paternity, and if so, whether that question should be addressed by this Court prior to its being addressed by the New Mexico Supreme Court.

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MOTION TO DISMISS APPEAL

The appellee State of New Mexico, *ex rel.* Human Services Department (hereinafter Department) respectfully moves the Court under Rule 16 to dismiss this appeal because there is no basis for jurisdiction under 28 U.S.C. §1257(2), and because events subsequent to the New Mexico Supreme Court decision have rendered this case moot. In addition the nonjurisdictional questions appellant Jimmy Jojola (hereinafter Jojola) seeks to raise are premature.[1]

Because of subsequent events the questions which Jojola seeks to present do not accurately state the questions before this Court. The questions now presented by this appeal are:

(1) Whether actions and events subsequent to the New Mexico Supreme Court decision have rendered moot the question of which forum should determine paternity and set a level of child support.

(2) Whether the question of who must reimburse the Human Services Department for expenditures on behalf of the dependent minor child or in which court suit

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[1] In January of 1983, a new administration took office in New Mexico and began instituting substantial policy changes in the state's relationship to Indian Tribes in New Mexico. These changes necessarily occurred after the appeal to the New Mexico Supreme Court was briefed and argued in 1982. An analysis of the state's position on domestic relations matters involving Indians was begun following the state Supreme Court's decision. The determination was made to defer to Tribal sovereignty in matters such as those presented by this appeal. The actions of the Department in developing new manual policy followed promptly. It was decided that Mr. Jojola be given the benefit of the new policy while the manual revision was being developed and, therefore, actions to implement the policy were instituted in this case.

must be brought is ripe for review prior to a determination of paternity, and if so, whether that question should be addressed by this Court prior to its being addressed by the New Mexico Supreme Court.

STATEMENT OF THE CASE

The following additional facts should be added to those presented in appellant's Jurisdictional Statement:[2]

1. On July 1, 1983, the Department issued a new formal policy governing the procedure to be followed in all cases seeking to establish paternity and set levels of child support where the child, mother and putative father are all Indians residing on the reservation. The new policy recognizes the right of the Indian people on a reservation to make their own determination of paternity and to set levels of child support. It further states the Department's policy will be to assist the mother of the dependent child in tribal court to establish paternity. See Appendix A.[3]

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[2] Responsibility to pursue paternity and child support obligations is delegated to the state by Subchapter IV-D of the Social Security Act, 42 U.S.C. §651, et seq. (Aug. 14, 1935, c.531, Title IV, §451, as added Jan. 4, 1975, Pub.L. 93-647, §101(a), 88 Stat. 2351, and amended Aug. 13, 1981, Pub.L. 97-35, Title XXIII, §2332(a), 95 Stat. 861). The state has designated the Department to fulfill these responsibilities by Section 27-2-27 and 27-2-28, N.M.S.A. 1978. These sections are set forth in full as Appendix E.

[3] The additional actions by the Department changing procedures and policy and obtaining dismissal of the original action in state court are properly to be considered by this Court. *Fusari v. Steinberg*, 419 U.S. 379 (1975); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972).

2. On or about June 13, 1983, Dyana Abeita, the mother of the dependent minor child, filed a paternity and child support action on behalf of the child in Isleta Tribal Court. The Department's attorney represents her in this action. See Appendix B.

3. The Department filed a motion to dismiss its petition in the District Court of the State of New Mexico on June 13, 1983, on the grounds that the paternity issue would be pursued in the Tribal Court of Isleta. See Appendix C. On June 29, 1983, this motion was granted over the objection of Jojola, and the petition to determine paternity and set child support was dismissed without prejudice. See Appendix D.

ARGUMENT

I.

THIS CASE IS MOOT BECAUSE THE DEPARTMENT HAS ISSUED A FORMAL POLICY REQUIRING THAT PATERNITY PETITIONS SUCH AS THE ONE IN THIS CASE BE FILED IN TRIBAL COURT.

The Department has issued a formal policy statement which details the procedures to be followed in all cases similar to the one presented by this appeal.[4] The policy statement

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[4] The policy statement has been codified as Section 529, Case Application and Referral Procedures of the Department's Program Manual, Income Support Division, Volume III, Child Support Enforcement Program, and is reproduced in full and attached as Appendix A. The policy statement is repeated verbatim as Section 548 (Case Processing–Establishment of a Support Obligation), Section 559.1 (Case Processing–Establishment of Paternity), Section 569.2 (Case Processing–Enforcement), and Section 574 (Case Processing–Interjurisdictional Cases).

directs that in all such cases, in which the mother, putative father, and child are Indians who reside on the reservation, the paternity petition shall be filed in the Tribal Court of competent jurisdiction. This type of formal policy statement becomes part of the organic law of the State of New Mexico.[5] The Department is bound by the manual provision, which is enforced by the courts as the law of the state. *See Hillman v. Health and Social Services Department*, 92 N.M. 480, 590 P.2d 179 (Ct. App. 1979).

Formal changes of a Department's policy go far beyond the mere cessation of challenged activity by the defendants in *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), where the Court was concerned that the defendants could freely return to their old ways. For the state to return to its former ways would require the same elaborate policy and manual revisions as have just transpired in instituting the changes found in footnote 4, *supra*. Formal policy statements are internal controls which the agency imposes on its own operations and exercise of power. Federal courts have recognized that similar statements by federal agencies have the force of law, *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974), or create binding law, as the court found in *Gibson Wine Co. v. Snyder*, 90 U.S. App. D.C. 135, 194 F.2d 329 (1952). This type of change in law, applicable to the case at bar and to all future cases, obviates the need for an Article III court to resolve the issues raised by the prior controversy.

The promulgation of this policy renders this case moot because it no longer presents a justiciable case or controversy.

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[5] The manual revisions are filed with the Records Center pursuant to the Public Records Act, Section 14-3-1, et seq., N.M.S.A. 1978, and State Rules Act, Section 14-4-1, et seq., N.M.S.A. 1978.

The Department has substantially adopted the position urged by Jojola, and the parties are in agreement on the issue presented for adjudication. A ruling from the Supreme Court of the United States now could not give Jojola any relief that he does not already have from the state. Consequently a decision by this Court would be merely advisory. As the Court has repeatedly noted, the Constitution of the United States limits the federal courts to adjudication of cases and controversies and bars advisory opinions. U.S. CONST. art. III, §2; *Liner v Jafco, Inc.*, 375 U.S. 301, 306, n.3 (1964).

The facts presented by this appeal are clearly encompassed by the new policy statement's provisions. Pursuant to the established policy, the Department is pursuing its remedies in Tribal Court where the parties are all Indians residing within the reservation. Mr. Jojola, Ms. Abeita and her son, Jonathan Abeita, are all enrolled members of the Isleta Tribe and reside on the Isleta reservation. Jurisdictional Statement, p. 14.

At the time the notice of appeal was filed in this case, a live controversy affecting the rights of Jojola existed. Since that time, however, the Department codified its policy decision to defer to Indian Tribal sovereignty in paternity determinations such as presented here. The controversy that was present when the case was initiated no longer exists and because the controversy must continue at the appellate or certiorari review stage, this case is now moot. *Roe v. Wade*, 410 U.S. 113, 125 (1973).

Where changes have occurred such as here, this Court must review the decision below in light of the law "as it now stands, not as it stood when the judgment below was entered." *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972); *Hall v. Beals*, 396 U.S. 45, 48 (1969). The promulgation of a formal manual revision by the Department extends the

protection of the policy not only to Jojola but to all similarly situated persons.

II

THE DEPARTMENT HAS SOUGHT AND OBTAINED A DISMISSAL OF THIS ACTION IN STATE DISTRICT COURT THEREBY MAKING THIS APPEAL MOOT.

On June 13, 1983, the Department filed a Motion to Dismiss this case in the District Court of New Mexico. This motion was granted on June 29, 1983. The Motion and the Order granting it are attached as Appendices C and D, respectively. The cause was remanded to that court on March 31, 1983, by the New Mexico Supreme Court. In conformance with the new policy, the Department will no longer pursue this case in the state's courts.

The legality of the forum initially chosen by the Department is the basis of the lawsuit on appeal. The withdrawal or voluntary dismissal of the legal action which is the basis of the appeal in itself renders the appeal moot. *Williams v. Simons*, 355 U.S. 49 (1957). There is no viable case or controversy of the kind necessary "to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969). All the parties to this action are in agreement that this case should not be litigated in state court and further that appropriate jurisdiction for determinations of paternity lies in the Tribal Court. The dismissal by the state court leaves extant only the paternity action of the mother in Tribal Court, and no justiciable controversy remains before this Court.

III.

ANY DETERMINATION OF RESPONSIBILITY FOR REIMBURSEMENT FOR PAST CHILD SUPPORT IS PREMATURE AND NOT RIPE FOR DECISION.

A noncustodial parent is liable to the Department in the amount of the public assistance paid to persons to whom that parent owes a duty of support. Section 27-2-28, N.M.S.A. 1978. No action can lie for such repayments, however, until a determination of paternity is made. Neither the state district court nor the New Mexico Supreme Court has addressed the merits of this case; therefore, no determination has been made of the paternity of Jonathan Abeita. Until such time as the paternity of the dependent child is determined, any attempt to collect for sums expended by the Department and the federal government on the child's behalf would be premature. Any action against Jojola in any court to collect under the repayment statute would not be ripe for decision at this time. This Court should decline to decide this matter because it is not yet ripe for review.

The "basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967). Whether Jojola owes any obligation to repay the sums expended under the Public Assistance Act (§§27-2-1, *et seq.*, N.M.S.A. 1978) is premature absent an adjudication that he is a "noncustodial parent [who] owes a duty of support." §27-2-28(A), N.M.S.A. 1978. A decision anticipating the Department's action is therefore inappropriate. The possibility

exists that the Isleta Tribal Court will determine that Jojola is not the dependent child's natural father. Until this issue is resolved by the Tribal Court, the Department cannot know what action it will take.[6]

The New Mexico Supreme Court did not address this matter in its opinion and thereby implicity recognized that the question was premature. Moreover, because the New Mexico Supreme Court did not make any decision concerning reimbursement actions, this Court should not assume jurisdiction to decide such a question.

IV

JOJOLA CANNOT INVOKE 28 U.S.C. §1257(2) WHERE THE NEW MEXICO SUPREME COURT HAS NOT RULED ON THE VALIDITY OF ANY NEW MEXICO STATUTE.

Jojola contends that he comes within the appeals provisions of 28 U.S.C. §1257 (2), by claiming that assumption of jurisdiction by the New Mexico courts would be repugnant to the Constitution, treaties or laws of the United States. However, the New Mexico Supreme Court in deciding this case did not rule on the question of the validity of any New Mexico statutes nor has Jojola raised any such issue in his jurisdictional statement. Until the New Mexico Supreme Court analyzes and rules on the relevant statutes and treaties as applied to the particular facts of an individual case or controversy, and rules that the federal statutes or treaties are invalid, or that New

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[6] Pursuant to Section 529, *et al.*, of the Child Support Enforcement Program Manual, any action to collect past Aid to Families with Dependent Children (AFDC) support must be approved by the Chief of the Child Support Enforcement Bureau and the General Counsel of the Department.

Mexico statutes are valid which are allegedly repugnant to the Constitution, treaties or federal statutes, this Court has no justiciable case before it. *Flournoy v. Wiener*, 321 U.S. 253 (1944). *See Baltimore & Potomac R. Co. v. Hopkins*, 130 U.S. 210 (1889).

CONCLUSION

Wherefore, Appellee Department respectfully submits that the questions upon which this cause depends are moot, premature and so insubstantial as not to need further argument, and Appellee Department respectfully moves the Court to dismiss this appeal.

Respectfully submitted,

PAUL G. BARDACKE
Attorney General of New Mexico

WILLIAM G. WALKER
Assistant Attorney General

P.O. Box 2348
Santa Fe, New Mexico 87504-2348
(505) 827–4122

Counsel for Appellee

July 12, 1983

CERTIFICATE OF SERVICE

I, William G. Walker, hereby certify, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, that on the 12th day of July, 1983, I served the requisite number of copies of the foregoing Motion To Dismiss by first class mail on counsel of record for Appellant, Anthony F. Little, Indian Pueblo Legal Services, Inc., Star Route Box 38, Santa Ana Pueblo, Bernalillo, NM 87004.

WILLIAM G. WALKER
Assistant Attorney General

APPENDIX A

N.M. Human Services Dept. Program Manual, Income Support Division, Vol. III

529 Deference to Indian Tribal Sovereignty

The Human Services Department recognizes the right of Indian people residing on the reservation to resolve fundamental issues in the area of domestic relations within the framework of established principles of Indian Tribal sovereignty. As a result, and notwithstanding the holding of the New Mexico Supreme Court in State of New Mexico ex rel. Human Services Department v. Jojola, ____NM____, 660 P.2d 590 (1983), CSEB will not seek to establish the paternity in State Court of putative Indian fathers who are amenable to suit in Tribal Court where the mother, putative father, and child reside within the exterior boundaries of the reservation. In all such cases, a paternity petition shall be brought in the name of the natural mother, individually and as the natural guardian of the child, in the Tribal Court of competent jurisdiction. If the putative father is not amenable to suit in the Tribal Court or the Tribal Court will not exercise personal or subject matter jurisdiction, a paternity action may be brought in State court only upon the prior written approval of the Chief of the Child Support Enforcement Bureau and the General Counsel of the Department.

No action to enforce an AFDC support obligation may be brought against an absent Indian parent who resides on the reservation without the prior written aprroval of the Chief of the Child Support Enforcement Bureau and the General Counsel of the Department. No action to enforce a non-AFDC support obligation may be brought in State Court against an absent Indian parent who resides on the reservation without the prior written approval of the Chief of the Child Support Enforcement Bureau and the General Counsel of the Department.

APPENDIX B

TRIBAL COURT OF ISLETA PUEBLO

DYANA ABEITA, Petitioner,

-vs-

JIMMY JOJOLA, Respondent.

PATERNITY PETITION

Comes now petitioner, Dyana Abeita, and states unto the Court:

1. This petition is filed pursuant to Section 1-1-20 of the Legal Code authorization suits to determine paternity and child support.

2. Petitioner and respondent are members and residents of this Pueblo.

3. On October 13, 1979, petitioner gave birth to a child, Jonathan Abeita, who is also a member and resident of this Pueblo.

4. Respondent is the natural father of Jonathan Abeita and should be required to contribute to the support of the minor child according to his means.

5. Respondent has refused to provide for the support of the minor child.

WHEREFORE, petitioner prays the Court for:

1. An order determining the respondent to be the natural father of petitioner's child, Jonathan Abeita.

2. An order requiring respondent to support the child according to his means.

3. Such other relief as to the Court seems reasonable.

s/ Carrell Ray

Attorney for Petitioner
909 Virginia NE, Suite 101
Albuquerque, New Mexico 87108
(505) 841-4582

PETITIONER VERIFICATION

STATE OF NEW MEXICO)
)
COUNTY OF BERNALILLO)

Diana Abeita, being duly sworn states that she is the petitioner in the matter herein and that she has read the foregoing petition and knows the contents thereof and that the same is true of her own knowledge except as to matters herein stated to be alleged on information and belief, and as to them she believes them to be true.

s/ Dyana Abeita
Petitioner

SUBSCRIBED and SWORN to before me this
15 day of June, 1983.

LeRoy J. Moore
Notary Public-New Mexico

My Commission Expires 5/2/85

APPENDIX C

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

STATE OF NEW MEXICO, ex rel.
HUMAN SERVICES DEPARTMENT,
Petitioner,

-vs- DR-81-1660

JIMMY ANDREW JOJOLA,
Respondent.

MOTION TO DISMISS

Comes now petitioner through Assistant Attorney General Carrell Ray and moves the Court for its order of dismissal without prejudice for the reason that the paternity issue will be pursued in the Tribal Court of Isleta Pueblo as requested by respondent.

Respectfully submitted,

s/ Carrell Ray

Assistant Attorney General
909 Virginia NE, Suite 101
Albuquerque, New Mexico 87108
(505) 841-4582

I certify that I mailed a copy of
the foregoing instrument to
opposing counsel of record this
13 day of June, 1983
CR

APPENDIX D

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

STATE OF NEW MEXICO, ex rel.
HUMAN SERVICES DEPARTMENT,
Petitioner,

-vs- DR-81-1660

JIMMY ANDREW JOJOLA,
Respondent.

ORDER

This matter having come before the Court on petitioner's motion to dismiss, petitioner appearing in person by and through Assistant Attorney General William Walker and Barbara A. Brown, respondent appearing by and through his attorney, Anthony F. Little and the Court being advised in the premises, IT IS THEREFORE BY THE COURT ORDERED that the above cause is dismissed pursuant to petitioner's motion, without prejudice.

s/ Judge A. Joseph Alarid

DISTRICT JUDGE

Approved by:

Assistant Attorney General

Assistant Attorney General

Anthony F. Little
Attorney for Respondent

APPENDIX E

New Mexico Statutes Annotated,
Public Assistance Act

27-2-27. Single State agency; powers and duties.

The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV D of the federal act with the following duties and powers:

A. establish the paternity of a child in the case of the child born out of wedlock with respect to whom an assignment of support rights has been executed in favor of the department;

B. establish an order of support for children receiving aid to families with dependent children and, at the option of the department, for the spouse or former spouse with whom such children are living but only if a support obligation has been established with respect to such spouse or former spouse, for whom no order of support presently exists and seek modification, based upon the noncustodial parent's ability to pay, of existing orders in which the support order is inadequate to properly care for the child and the spouse or former spouse with whom the child is living;

C. enforce as the real party in interest any existing order for the support of children who are receiving aid to families with dependent children or of the spouse or former spouse with whom such children are living; and

D. represent nonaid families with dependent children in the establishment and enforcement of paternity and child support obligations, including locating the absent parent, for which it shall charge the applicant a start-up fee of twenty dollars ($20.00) and actual costs for the services performed,

which costs shall be recovered from support paid. If the costs exceed the amount of one month's support obligation, then the monthly collection shall be limited to ten percent of the collection. Where the service rendered is solely for the collection of past-due support, the department shall levy a fee not in excess of that provided by the federal act, against the delinquent parent[,] which fee shall be in addition to the amount of the delinquency and collectible as other judgments.

27-2-28. Liability for repayment of public assistance.

A. A noncustodial parent is liable to the department in the amount of the public assistance lawfully and properly furnished to the children, and the spouse or former spouse with whom such children are living, to whom the noncustodial parent owes a duty of support; except that if a support order has been entered, liability for the time period covered by the support order shall not exceed the amount of support provided for in the order, and provided that no claim not based upon a prior judgment can be made by the department for reimbursement for any period more than six years prior to the date of filing of any action seeking payment.

B. Amounts of support due and owing for periods prior to the granting of public assistance shall be paid to and retained by the department to the extent that the amount of assistance granted exceeds the amount of the monthly support obligation.

C. Amounts of support collected which are in excess of the amounts specified in Subsections A and B of this section will be paid by the department to the custodian of the child.

D. No agreement between any custodian of a child and a parent of that child, either relieving the parent of any duty of child or spousal support or responsibility or purporting to settle

past, present or future support obligations, either as a settlement or prepayment, shall act to reduce or terminate any rights of the department to recover from that parent for support provided, unless the department has consented to the agreement in writing.

E. The noncustodial parent shall be given credit for any support actually provided, including housing, clothing, food or funds paid prior to the entry of any order for support. The noncustodial parent has the burden on the issue of any payment.